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CURRENT TOPICS.

THAT sentence may, under some circumstances, be pronounced on a prisoner in his absence, is decided in a late case in Pennsylvania, *Lynch v. Commonwealth*. The defendant was arrested on a charge of larceny, he gave bail, pleaded "not guilty" and was tried. He was present in the court-room during all the time of the trial, until the jury retired, when he left the room. When the jury returned, the court directed the defendant to be called, but he failed to answer. His counsel stated that he had left town, but would be in attendance when wanted. The court then took the verdict, and ordered the forfeiture of the defendant's recognizance, and pronounced judgment. The Supreme Court in affirming the sentence, say: "Thus it appears that larceny, while termed a felony, is not in the light of legal history one of those offences which in this State were tried in the solemn forms of England required by the Act of 1718 to be adopted in cases then declared to be capital. This will make us understand better the expressions in the cases cited in the argument. Thus in Prine v Com. 6 Harris, 103 Gibson, C. J., said: 'Never has there, heretofore, been a prisoner tried for felony in his absence. No precedent can be found in which his presence is not the postulate of every part of the record. He is arraigned at the bar; he pleads in person at the bar, and if he is convicted, he is asked at the bar what he has to say why judgment should not be pronounced against him.' In these assertions he evidently refers to the trial of cases once capital. It is to such, also, Coulter, J., refers: 'Trials affecting life or limb, when the prisoner must be present, when the evidence is given in during the trial, and when the verdict is returned.' We are not left to inference as to the meaning of Gibson, C. J., for we have his opinion in Jacobs v. Com. 8 S. & R. 315, in which he held that upon an indictment for larceny it is not necessary that any arraignment should appear of record. When we consider, also, comparatively the greater degree of moral turpitude in some high misdemeanors, such as perjury, forgery, bigamy, etc., wherein the defendant may appear and plead by attorney, it cannot be doubted, even if arraignment be necessary as a fact in a trial for larceny, that mere voluntary absence at the rendition of the verdict by one out upon bail, who has appeared and been tried regularly, is not a fatal error. He loses no valuable right thereby, for he may move for a new trial and in arrest of judgment, and cannot be sentenced until he appears. * * * * Therefore, when we consider that larceny has always been a bailable offence, even before a justice of the peace, except in case of horse-stealing, and that its trial is put upon the same footing with misdemeanors in the quarter sessions and mayor's courts; that in misdemeanors the defendant may appear and plead by attorney, there is no reason for holding that mere voluntary absence at the rendering of the verdict, by one out on bail, who is called and who does not appear, is a ground for reversing a sentence already passed. One so absent waives his privilege. What can be done but call him? Is the jury to be held until he appears? and if so, how long? Not being in custody he cannot be had. If the jury be discharged, what is the legal consequence? Is it a mistrial, or can he plead the discharge in bar? Is his forfeiture of bail a legal substitute for conviction? And if the discharge be no bar, the offence being a bailable one, how will a similar result be prevented with the second or any subsequent trial? Surely the interests of justice cannot be so trifled with."

IN *State v. Brewer*, recently decided by the Supreme Court of Alabama, a statute of the State made it the duty of the auditor to audit and adjust the accounts of public officers and to state and certify such accounts. Transcripts from the books and proceedings of the auditor were evidence *prima facie* in all civil cases. It was held that after the accounts of a public officer had been formally audited and settled by the auditor, a subsequent auditor had no power to open and restate the accounts, and that transcripts of *his* proceedings were not *prima facie* evidence. STONE, J., said: "The office of auditor, though filled by successive incumbents, is a continuous thing,

Each of the several incumbents has the same powers, and only the same powers; neither is clothed with revisory powers over the other. When the auditor states and certifies an account against a tax collector, it becomes *prima facie* a correct account. A restatement by a subsequent auditor can only be *prima facie* correct. Which *prima facie* or presumptive proof shall overcome the other? The law has not declared that the later stated account shall prevail over the former. The law has said nothing on the subject. Is it implied in the nature of the duty? Many reasons combine to force us to the conclusion that the auditor has no power to correct errors he may detect in the accounts stated, certified and collected by any of his predecessors and thus make such restated account a *prima facie* charge against the officer. We state but one which we consider conclusive. If the auditor can restate one account, he can overhaul any number, and as the statute of limitations against the State is twenty years, he can extend his investigation back that number of years. Such a rule would be so harrassing that we cannot believe the legislature intended it." These conclusions are supported by authority. In Board of Supervisors v. Ellis, 59 N. Y. 620, a question arose as to the power of a succeeding board to review and readjust the actions of their predecessors. The court said: "Doubtless if a board of supervisors at one time act finally upon a matter of which they have jurisdiction, and as to which they have a lawful right to act, a succeeding board may not undo what they have done, to the immediate detriment of third parties." See, also, Board of Supervisors v. Briggs, 2 Denio, 26. In the case of Hobson v. Com., 1 Duvall, 172, an attempt was made by a succeeding auditor to correct an alleged mistake of his predecessor, in settling with the sheriff, who was tax collector, for revenue collected by him. Speaking of the acts of the auditor, as affecting the State, the court said, "He was her accredited organ, with full power and discretion to settle, and record as settled, accounts of sheriffs for revenue due to her. * * * His adjustment, once closed and registered by him, was made conclusive, unless changed by a direct judicial proceeding for the purpose of correcting an error or mistake committed by him. * * * The auditor himself was *functus officio*, and could not change the registered account by his own act. * * * And, of course, his successor could make no correction, and especially after two years, within which period even a suit for correction is expressly limited by law." See, also, County of Yallabusha v. Carbry, 3 S. & M. 529; Arthur v. Adam & Speed, 49 Miss. 404; United States v. Jones, 8 Pet. 375; Porter v. School Directors, 18 Penn. St. 144; Township of Middleton v. Miles, 61 Penn. St. 290; Burnett v. Auditor, 12 Ohio, 54; Kendall v. United States, 12 Pet. 524; Treasurer of Mobile v. Huggins, 8 Ala. 440.

SUGGESTIONS UPON CODE PROCEDURE AND CODE REVISION.

II. SOME DEFECTS IN CODIFICATION, AND SUGGESTIONS AS TO THEIR REMEDY BY REVISION.

Specialists possessing the proper abilities for success in their particular pursuits, are sometimes said to be, and perhaps usually are, sharp but narrow. This results from the philosophical principle of the mental constitution of man, by which the application of the intellectual faculties to a single science or art, or the devotion of one's life to a single pursuit, is likely to lead to the highest attainable perfection in such science, art or pursuit. Yet at the same time, the concentration upon the single pursuit tends to lead the mind away from general kuowledge, and more or less to lead to dogged and stubborn devotion to the established or received dogmas of the particular science or art, as taught by the school to which the party belongs.

Lawyers are not specialists in the strict sense. Fitness for the general practice in all its multifarious forms, as we find it everywhere in this country outside a few large cities where alone there are specialists in the profession, requires a breadth of culture equal to any pursuit in life. Indeed, it would seem that a lawyer in full practice, should understand all wisdom and all knowledge. Yet notwithstanding this, it cannot be denied that such thorough mastering of the elementary principles of legal science as is rendered necessary for the best success, usually leads lawyers to a strong conviction of the absolute truth of

the axioms, and the highest attainable perfection of the rules and principles impressed upon their minds as students. Hence no class of specialists even, are more reluctant to yield preconceived ideas of science or its methods than are lawyers as a class.

Allusion was made to this subject in a former article, but it is again referred to for the purpose of attributing to it a very prominent fault in the application of code reform to actual practice, with a view to suggest a remedy.

Before the commencement of code reforms, common law and equity modes of procedure were so totally dissimilar, that it was supposed they could not be blended. Then the forms of common law actions were supposed to be quite essential to harmony in practice. Add to these the large number of special proceedings devised by the English judges, and the other quite as numerous class of legislative special proceedings, and any thinking man must see that the system needs both "*simplification*" and "*abridgment.*" The codifiers have performed this part in some instances well; in others very radically but very imperfectly. Thus the abolition of the distinctions between law and equity in those States where it has been done, and the consequent distinction of the forms of actions, is well done. But the re-enactment of the old forms of special proceedings has been poorly done. What the legislature has attempted to do in unifying code precedure has not, as we have seen, been well seconded either by the courts or the profession. That which remains to be done by revising and practice reforms should be wisely directed so as to lessen litigation: that is enable skilful counsel before competent judges with the least expense and delay to determine the rights of parties litigant; for after all this is the great *desideratum*. As pointing to this result the remainder of this paper will be devoted to the subject of unification by practice reform, and revision.

Educated to the pursuit of remedies by the methods adopted by the courts of law and equity, respectively, with the narrow views naturally arising from the causes already noted, it was exceedingly difficult for the profession to see how a uniform rule of practice and a uniform mode of procedure could be adopted in the pursuit of remedies in all cases indifferently, with regard to their former classification. And, indeed, it is hard for many of us still to divest ourselves of the fallacious belief that in framing a complaint or petition upon a promissory note we must follow the common law forms, and when we foreclose a mortgage we must follow the equity forms, or that when we sue for damages for the breach of a contract, the common law forms, both of pleadings and entries, must be adopted, while if the suit is for the specific performance of the same contract, the procedure must be according to the equity forms.

There is no sanction in any of the codes for any such an idea; but the sanction is found in the inability of the profession to seize the initial idea of code procedure or to utilize it. That is, that in a *civil action* all rights must be enforced and all wrongs be redressed by a uniform mode of procedure. That this is practicable becomes every day more apparent, and will be finally accomplished by the framing and adoption of forms adapted to the change, by additional comity between the codifiers, code revisers and the judges of the different States. This result will be facilitated by the going off the stage of the class of lawyers educated under the former system.

It is quite clear to the unprejudiced observer that but from love of the traditional forms of procedure, made almost sacred by their antiquity, we should never think there should be any difference in the forms of pleadings, proceedings or judgment, in an action for the breach of covenant upon a bond for a deed and an action for a specific performance of the covenant in the same bond, further than is necessary to vary the relief prayed and granted respectively. Yet it is historically true, as the files of the courts in the code States will abundantly prove, that in the given case the difference in the forms of procedure formerly peculiar to law and equity, respectively, are to a great extent maintained, though quite unnecessarily.

This prejudice against progress has led able lawyers in the States adhering to the common law forms to attribute all the faults and misfortunes to which law practice is subjected to the adoption of codes of procedure. Thus the evils resulting from the elective judiciary, a bad system of selecting jurors, and even an unfortunate legislative regulation which per-

mits the judges to grant injunctions throughout the State, without regard to their judicial districts, have been attributed to code procedure. No less distinguished a lawyer than Hon. Jere. Black wrote a magazine article, a few years ago, upon the Railroad War in New York, in which he attributed all the disgraceful results of the legislation above referred to to the existence of a code of procedure, when, in fact, there was no connection whatever between the code of procedure and the fault complained of. While the codes have generally, perhaps, done what was required for unification in this respect, and the greater perfection has been prevented by want of ready acquiescence in the new system by its administrators, these results will be counteracted mainly by causes which have been mentioned and others which will occur, with only such revisions as have been or may be suggested by defects in this respect apparent in practice.

But the chief want of unity, which should at once be remedied by revisory legislation, is in what are termed special proceedings. We have too much complication, and too much detail in pointing out special methods. These special proceedings occupy a large place in our code provisions; are difficult to learn in detail, and are the cause of an infinite amount of litigation which might be prevented by judicious revision. Why should the proceedings in a suit for divorce, for partition, *habeas corpus*, *quo warranto*, *mandamus*, or any other special proceeding be conducted under different forms of procedure from those under which civil actions are conducted? Indeed, in practice in this respect, there is usually more uniformity than the codes warrant. Why call the first paper in one of the proceedings a *petition* or an *affidavit*, while the same thing in a civil action is called a complaint? and why, in such a case, point out what such initial paper shall contain specifically? The law being fixed, the pleader should be required to plead just as in any civil action, stating the necessary facts. All these special provisions as to form have to be settled by judicial construction. It must not be inferred that some legislation is not necessary in every code of procedure to continue these very necessary special proceedings in operation, as all of them are necessary, and are to be vitalized and adapted to their appropriate purposes. But the criticism is that codifiers find it more easy to appropriate former enactments, by adopting them without adapting them to the changed forms of precedure. The proposition, therefore, is that where the original codifiers have fallen into these errors where a code revision occurs the remedy should be applied.

As already suggested, we insist that code reform should be thorough, so as to produce uniformity, so far as forms of procedure are concerned, so that there shall be but one form of action, and that this form shall apply as well to what are known as special proceedings as to what were formerly actions at law and suits in equity. At first view this may seem of questionable practicability. But there is no basis for the question. In all cases where *civil rights* exist, and they are denied or invaded and *wrongs* are consequent upon this denial or invasion, the law provides a remedy, and in the pursuit of this remedy there is no intelligent reason why the same general rules in stating the cause of action or defense should not prevail. There exists in all cases alike the same relation of *legal principle*, *matter of fact* and *legal inference* which prevailed at the common law. Indeed, there is no reason why such a unified system of code procedure would not reduce the whole to one standard and bring about the same accuracy, certainty and consistency as is found in the common law procedure, with such simplicity and disregard of purely technical rules as greatly to lessen the amount of labor and delay in litigation, and to render court procedure less a competition between counsel to confuse each other, the court, the jury and the witnesses, and obscure the truth and pervert justice, than to assist the court to find out the truth and administer justice according to the "very right of the case."

But lest we should be charged with indulging in glittering generalities, we will close this paper with another paragraph upon the method of accomplishing the proposed unity by revision.

As we have seen all radical changes produce temporary inconvenience, hence it is often better to endure partial inconvenience than to make changes that endanger stability. But as we have embarked upon the sea of code reform, we had better accomplish the whole voyage but slowly and cautiously. We should heed the way-marks, which have already been

indicated by the courts, and we should so work toward unification as not to disturb these way marks; and while this is done the nearer we can by revision come to unity, and the sooner this can be accomplished, the sooner will our system reach proximate perfection, until our code pleadings shall reach that "*coherent system of legal logic*" so much eulogized by the English lawyers, and so beautifully and ingeniously formulated and illustrated by Judge Gould in his work on pleadings. And the practice will then grow into a like logical symmetry, and code procedure thus unified and perfected, will become the most perfect system known to civilization.

We will continue these suggestions in another article upon code revision in general.

ASA IGLEHART.

INDIAN LANDS—"LANDS OF THE UNITED STATES."

UNITED STATES v. REESE.

United States District Court, Western District of Arkansas, May Term, 1879.

1. THE CHEROKEE TRIBE OF INDIANS hold their lands by a title different from the Indian title by occupancy. They derived it by grant from the United States. *It is a base, qualified or determinable* fee, without the right of reversion, but only a possibility of reversion in the United States.

2. THE LANDS OF THE CHEROKEE TRIBE of Indians can not, therefore, be held to be "lands of the United States," in the sense of the language used in section 5388 of the Revised Statutes of the United States.

3. PENAL STATUES ARE TO BE construed strictly. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused.

In this case the defendant is charged by an information preferred by the district attorney, and filed on the 5th of April, A.D. 1879, with violating section 5388 of the Statutes of the United States, "by unlawfully cutting timber on lands situated and lying in the Cherokee Nation in the Indian country in the western district of Arkansas, which said lands, in pursuance of law, may be reserved and purchased by the United States for military or other purposes."

To the information, the defendant, by his counsel, files a demurrer setting up (1) that the matters and things stated in the information do not constitute an offense, and (2) that this court has no jurisdiction of the offense charged in said information.

W. H. Clayton, U. S. District Attorney, for the government; *Duval & Cravens* for the defendant.

PARKER, J.

The first ground of the demurrer is the only one I propose to give any attention; because if this act charged against the defendant is one which is declared an offense by the section referred to in the statement of the case, I have no doubt the court has jurisdiction. Of course, if it is no offense, then it has no jurisdiction to try and punish, because there is nothing to which jurisdiction can attach. It is conceded in this case that the timber charged to have been cut by defendant was cut on lands formerly ceded by the United States to the Cherokee tribe of Indians.

There are certain things which make up this offense. These are the elements which enter into it and go to constitute it. They consist of the positive acts of the party charged, as well as the existence of other facts, all of which must exist before it can be held that the defendant is subject to the penalty prescribed by the law.

In this case there must be a cutting of the timber by the defendant. It must be unlawfully done—that is, done wrongfully without authority of the United States or her agents. These are the positive acts of the defendant. In addition thereto the cutting must be done on lands of the United States, which, in pursuance of law, may be reserved or purchased for military or other purposes.

The pertinent question in this case is: Was this done upon "lands of the United States"? It is conceded that it was done upon lands which have been heretofore granted by the United States to the Cherokee Indians. Does the United States still have such a title to these lands as that they can be called lands of the United States in the sense of the law upon which this prosecution is based? If she has such a title thereto, this act of the defendant is a penal offense, and he is amenable to the punishment prescribed by the section above referred to. If she does not have such a title, this prosecution must fall as being an act, although a gross outrage and a grievous wrong, not prohibited by law.

To determine the question whether these are lands of the United States requires a consideration of the title by which they are held by the Cherokee Nation. To any one who has given any attention to this subject, it presents a question not free from doubt or intrinsic difficulty.

The Cherokee Nation of Indians derived their title to their lands from the United States by grant. This grant is by virtue of different treaties made between them and the United States. By the 2d Art. of the treaty of May 6th, 1828, Rev. I. T. 54, "the United States agrees to possess and guarantee to the Cherokees *forever* seven millions of acres of land, and this guarantee is hereby solemnly pledged." This land is a part of the country now occupied by them. On the 28th of May, 1830, Congress passed a law, the first section of which provided that "it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States west of the river Mississippi, not included in any State or organized Territory, and to which the Indian title has been extinguished, as he may

judge necessary, to be divided into a suitable number of districts for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove, and to cause each of said districts to be so described by natural or artificial marks as to be easily distinguished from every other." Section 3 of said act provides "that in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them and their heirs or successors the country so exchanged with them, and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: provided, always, that such lands shall revert to the United States if the Indians become extinct or abandon the same." Vol. 8 Laws of U. S., 342.

By section 1 of the treaty of the 14th of February, 1833, concluded between the Cherokees and the United States (Rev. I. T. 63), "the United States agrees to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby pledged of seven millions of acres of land, to be bounded" as set out in said article. By the 3d article of the treaty of the 29th of July, 1835, it is provided that the lands ceded by the treaty of the 14th of February, 1833, including the outlet and those ceded by this treaty, shall all be included in one patent executed to the Cherokee Nation of Indians by the President of the United States, according to the provisions of the act of May 28, 1830. In pursuance of the terms of this treaty, the President of the United States on the 31st of December, 1838, executed to the Cherokee Nation a patent for the seven millions of acres of land, for the outlet west, as well as the eight hundred thousand acres of land granted to them by the treaty of the 29th of December, 1835.

The granting clause of this patent is as follows: "Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted, and by these presents do give and grant unto the said Cherokee Nation the two tracts of lands so surveyed and hereinbefore described, containing in the whole 13,374,135.14 acres, *to have* and *to hold* the same together with all the rights, privileges, and appurtenances thereunto belonging to the said Cherokee Nation forever * * * * subject also to all the rights reserved to the United States in and by the articles heretofore recited, to the extent and in the manner in which the said rights are so reserved, and subject also to the conditions provided by the act of Congress of the 28th of May, 1830, and which condition is, that the lands hereby granted shall revert to the United States if the said Cherokees become extinct or abandon the same."

Now, the question arises, what kind of a title do these several treaties and this law of 1830 give the Cherokees to their lands? If it were not for the treaty of 1835, the treaty of 1833 is broad enough in its terms to convey a fee simple title. This treaty is subsequent in date to the act of 1830, which contained the clause that the lands should revert to the United States if the Indians "become extinct or abandon the same." There is no limitation to the title conveyed by the United States of 1833. If such treaty is inconsistent with the law of 1830, it repealed so much of it as was inconsistent. Besides the act did not make any grant, it only provided that it might be done.

The treaty-making power was not limited by its terms, as the authority to make a treaty with the Indian tribes was one which the treaty-making power derived from a source higher than an act of Congress, to wit; the Constitution. And by this power the President and senate of the United States could make a treaty with any Indian tribe, extending to all objects, which, in the intercourse of nations, had usually been regarded as the proper subject of negotiation and treaty, if not inconsistent with the nature of our government, and the relation between the States and the United States. This treaty-making power could make a sale or grant of land without an act of Congress. It could lawfully provide that a patent should issue to convey lands which belong to the United States without the consent of Congress, and in such case the grantee would have a good title. Holden v. Joy, 17 Wall. 247. U. S. v. Brooks, 10 How. 442. Meigs v. McClurg, 9 Cranch, 11.

Congress has no constitutional right to interfere with rights under treaties, except in cases purely political. Holden v. Joy, 17 Wall. 247. Wilson v. Hull, 6 Wall. 89. Ins Co. v. Carter, 1 Pet. 542. Doe v. Wilson, 23 How. 461. Mitchell v. United States, 9 Pet. 749. The Kansas Indians, 5 Wall. 737. 2 Story on Constitution, sec. 1508. Foster v. Neilson, 2 Pet. 254. Crews v. Burcham, 1 Black, 356. Worcester v. Georgia, 6 Pet. 562. Blair v. Pathkiller, 2 Yerg. 407. Harris v. Burnett 4 Blackf. 369. If title passed by the treaty of 1833, there were no restrictions upon it.

But it may be asked how could this title be held to be a title in fee when the word heirs was not used in the grant. At the common law, by a rule which in this country is purely technical, the word heirs is necessary. But this rule did not apply to grants to corporation aggregate. The fee passed without the words heirs or successors because in judgment of law a corporation never dies, and is immortal by means of perpetual succession. 4 Kent Com. 7. This tribe of Indians may be regarded under the law as a corporation aggregate. It has been claimed by some that this title obtained under the treaty of 1833 could not be a fee simple title because it was taken under the general law prohibiting the alienation of Indian lands, and that this was such a restriction upon the title as to take away its fee simple character. But this act was not in existence until the 30th of June 1834. But it is said the treaty of 1833 did not operate to convey the lands described therein. This point is not entirely free from doubt. But it does seem to me that the words used in the first section of the treaty are sufficient to operate as a cession of the land mentioned in the treaty. "The United States agrees to possess the Cherokees and to guarantee to them forever, and that guarantee is hereby

pledged of seven millions of acres of land." The United States agrees to possess what? Why the land described. And to guarantee what, and for how long? Why not the possession, but the land, and forever. It does seem to me that this was a cession of the land described. This opinion is confirmed by the language of the second article of the treaty of 1835, (Rev. I. T. 68). It is: "The United States also agrees that the lands above, ceded by the treaty of Feb. 14, 1833." This language is a recognition of the cession of the lands. If they had already been ceded to the Cherokees forever by the treaty of 1833, then the agreement by the United States by the 3rd article of the treaty of 1835, to give them a patent for these lands according to the provisions of the act of Congress of May 28, 1830, was a mere *nudum pactum*. It was an attempt to place a restriction upon a title which had already passed, and which, according to the 1st section of the treaty of 1833, was to be evidenced by patent.

I am unable to see what consideration passed to the Indians to induce them to take a title of less grade under the 3d article of the treaty of 1835, when they, by the terms of the first article of the treaty of 1833, had one of a higher grade. Now unless the treaty was afterwards modified by some other treaty or law, and my construction of it is the correct one, it cannot be held that these lands of the Cherokees are "lands of the United States" in the sense of the language of Sec. 5388 of the general statutes. Although the construction may be at fault, still it throws some light on what must have been intended by the treaty of 1835.

But suppose the condition contained in the patent is valid. Let us see what effect that has upon the title. The condition is that the lands *revert* to the United States if the said Cherokees become extinct or abandon the same. Now the first of these conditions is one which would be silently engrafted on the grant, independent of any express words. When there is a grant, and the grantee and his heirs become extinct the land escheats to the State whether the grantee be an individual or a body of individuals. In an ordinary patent absolute from the government the implied right of escheat to the sovereign lies behind the patent. In this case it is expressed.

Therefore, that expressed condition does not take away the character of a fee simple title. But the other one against abandonment does. This leaves the title less than a fee. But what character does it have? Blackstone, book 2d, chap. 7. p. 109, says: "A base, or qualified fee, is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As in the case of a grant to A and his heirs, tenants of the Manor of Dale. In this instance whenever the heirs of A cease to be tenants of the Manor the grant is entirely defeated. * * * This estate is a fee because by possibility it may endure forever in a man and his heirs. Yet as that duration depends upon the concurrence of collateral circumstances which qualify and debase the purity of the donation, it is therefore a qualified or base fee." Mr. Kent, Vol. 4, p. 10 of his Commentaries, says: "A qualified base or determinable fee, is an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance by some act or event circumscribing its continuance or extent. It is the uncertainty of the event and the possibility that the fee may last forever that renders the estate a fee and not merely a freehold." If the condition attached to the fee is one which is certain to happen, *then there is a reversion*. If such condition is one which may never happen, there is not a reversion, *but only a possibility of reversion*. 4 Kent's Com., p. 9; 1 Washburn's Real Property, secs. 86, 87, and 88. Mr. Washburn in sec. 88, vol. 1, p. 90, says: "If the estate be to A and his heirs till B. comes back from Rome, the right to have it when he comes back is not a reversion but a mere *possibility*. He may not come back, and if he were to die before he came back, the estate would become absolute in the *grantee*."

Here is a grant made to the Cherokees, having conditions which may never happen, and which in the face of the facts that the Cherokee Indians are not likely to become extinct, and that they are now occupying the lands with no intention of abandoning the same, there is only a remote possibility of either event happening. In such case there is not an absolute *right of reversion* in the United States, but only a possibility of reversion. There is a broad distinction between the rights of the grantee in case of a reversion and a mere possibility of reversion. When there is only a possibility of reversion all the estate is in the feoffee, notwithstanding the qualification. 4 Kent's Com., p. 11; 2 Bouvier's Inst., sec. 1699, p. 220; 1 Washburn's Real Property, p. 89 and 90.

This Indian title being a base, qualified or determinable fee with only *the possibility of a reversion* and not the right of reversion in the United States, all the estate is in the Cherokee Nation of Indians. I cannot, therefore, see how these lands, which have been depredated upon, can be held to be "lands of the United States," in the sense of the language used in sec. 5388.

It must be remembered that this is penal statute, and it must, therefore, be construed strictly. In the office of the interpretation of statutes, courts, particularly in statutes that create crimes, must closely regard and ever cling to the language which the legislature has selected to express its purpose. And when the words are not technical, or words of art, the presumption is a reasonable and strong one that they were used by the legislature in their ordinary, popular and general signification. Statutes enjoin obedience to their requirements, and unless the contrary appears, it is to be taken that the legislature did not use the words in which its commands are expressed in any unusual sense. Therefore the law is settled that in construing statutes the language used is never to be lost sight of, and the presumption is, that the language used is used in no extraordinary sense, but in its common, every-day meaning. The legitimate function of courts is to *interpret* the legislative will, not to supplement it or to supply it. The judiciary must limit themselves to explaining the law; they can-

not make it. It belongs only to the legislative department to create crimes and enjoin punishments. Accordingly courts, in the construction of statutable offenses, have always regarded it as their plain duty cautiously to keep clearly within the expressed will of the legislature, as otherwise they shall hold an act or an omission to be a crime, and punish it, when, in fact, the legislature had never so intended. United States v. Clayton, 2 Dill. 219.

Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused. United States v. Whittier, 7 Cent. L. J. 51; U. S. v. Morris, 14 Pet. 694; U. S. v. Wiltberger, 5 Wheat. 76; U. S. v. Sheldon, 2 Wheat. 119; U. S. v. Clayton, *supra*.

Therefore, in the face of these principles of the law so well sustained by authorities, if it does not clearly appear to the judicial mind that these lands granted to the Cherokee Indians are "lands of the United States" in the sense intended by its makers to be attached to the statute, then the act of the defendant is not one covered by the terms of the law, and he is not subject to its penalty. It is to be regretted that it cannot be held to be an offense, as the complaints of depredations upon the timber of the Indian lands are constantly being made to officers of this court. There are a class of men on the borders of the Indian country who revel in the ides that they have an inherent, natural right to steal from the Indians. This right is not to be questioned. They think it a tyrannical use of authority if they are interfered with.

There should be a law enacted, the penalty of which would teach persons that Indians have rights which should be respected as well as the rights of citizens. This is with the law-making power and not with this court. That it is the right of Congress to pass a law protecting the timber on the lands of these people is clear; the duty of Congress to do so in the face of the pledges of the government of the United States, made by her treaties and her laws, to protect these Indians from unlawful intrusions from without, and from violations of their rights by any and all persons, is clear.

If the law-making power will give us a law we will lay its mailed hand upon its violators; gently and tenderly, it is true, yet in such a way that the timber in that Indian Territory will be protected from the rapacity of those who are now stealing it. It remains with us to execute the law, not to make it. And it is with regret that we must hold in this case that the offense, for the reasons already given, is not within the terms of section 5388.

The demurrer is therefore sustained.

THE statement that the conviction of Charles Hartwell, a conductor of the Old Colony Railroad, of manslaughter, for neglect of duty resulting in a fatal accident, is the first instance in this country in which a railway conductor has been so convicted, appears to be incorrect. A similar conviction took place in New Jersey in 1866. See State v. O'Brien, 32 N. J. 169.

FORECLOSURE OF MORTGAGE—JURISDICTION OF COURT OF EQUITY TO APPOINT RECEIVER TO COLLECT RENTS.

HAAS v. CHICAGO BUILDING SOCIETY.

Supreme Court of Illinois.

[Filed at Ottawa, January 25, 1879.]

1. A COURT OF CHANCERY may, in a suit to foreclose a mortgage, appoint a receiver to collect the rents and profits arising from the property mortgaged, even when the mortgage does not, by express terms, give a lien upon the income derived from such property, and although there may have been a decree and sale of the property under the mortgage.

2. BUT THIS CAN ONLY BE DONE where it is made to appear that the mortgaged premises are insufficient security for the debt, and the person liable personally therefor is insolvent, and where there are circumstances of fraud or bad faith on the part of the mortgagor, which would render a denial of the relief sought inequitable.

3. WHETHER THESE FIRST TWO conditions would be sufficient, without circumstances of fraud or bad faith,—*quære?*

BAKER, J., delivered the opinion of the court:

The points presented by this record are as to the jurisdiction of a court of chancery to appoint a receiver to collect rents and profits in a suit to foreclose a mortgage and as to the authority to make such appointment after decree and the sale of the mortgaged property, and if such discretionary power does exist, whether it was properly exercised in the case at bar.

We find the decided weight of American authority to be in favor of the proposition that the court may, even when the mortgage does not by express words give a lien upon the income derived from such property, appoint a receiver to take charge of it and collect the rents, issues and profits arising therefrom. Such action will not be taken, however, unless it be made to appear that the mortgaged premises are an insufficient security for the debt, and the person liable personally for the debt is insolvent, or at least of very questionable responsibility. A combination of these two things seems to be required in all the cases we have examined, and in one or more of the States it is held necessary that still other elements should be conjoined to these before such procedure is justified.

In Myers v. Estell, 48 Miss. 372, it was held in the absence of any stipulation in the contract, that the mortgagee shall have the rents and profits that he has no claim thereto, merely on the ground that the debt is due and the title becomes absolute, but is only entitled to a receiver for the collection and appropriation of the rents where the property is insufficient to pay the debt, and the mortgagor is insolvent or unable to pay any deficiency that might remain after sale of the property mortgaged.

In Hyman v. Kelly, 1 Nev. 179, the court, after stating that courts of equity have usually appointed a receiver when the property was insufficient to

pay the mortgage debt and the mortgagor was insolvent, review the facts of the case before them and find therein other equitable circumstances to exist to justify the granting of the relief sought, and they reverse the action of the lower court and say, "We think there are many cases where such an appointment is necessary to prevent fraud and injustice and loss of security."

In Sea Insurance Co. v. Stebbins, 8 Paige, Chy. 565 it was held that to justify such appointment in a foreclosure suit there must be shown, first a deficiency in the value of the mortgaged property and secondly that the mortgagor or other person personally liable for the debt is irresponsible or is unable to pay the expected deficiency. The same rule is announced in Astor v. Turner, 11 Paige Chy. 436; in Warner v. Governeur's Executor's, 1 Barb. 38 and in other New York cases. In Cheever v. R. & B. R. R. Co. 39 Vt. 654, the doctrine is recognized that the court will appoint a receiver in foreclosure proceedings for the purpose of preserving the property and its rents and profits from waste and diversion.

In Michigan, in the case of Brown v. Chase, Walker's Ch. 43, it is said: "A receiver of the rents and profits of mortgaged premises is sometimes appointed on the petition of the mortgagee after he has filed his bill to foreclose the mortgage. The court must be satisfied before making the appointment, that the morgaged premises are insufficient to pay the mortgage debt, and that the mortgagor or other party to the suit who is personally liable for its payment is insolvent or out of the jurisdiction of the court, so that an execution against him for the balance that should remain due after a sale of the mortgaged premises, would be unavailing."

In Finch v. Houghton 19 Wis. 150 where it appeared the whole mortgage debt was past due and a considerable amount of interest remained unpaid and the owner of the equity of redemption in possession neglected to pay the taxes, and where the evidence tended to show he had endeavored to obtain tax deeds upon the mortgaged property to defeat the mortgage, and also the mortgaged premises were not an adequate security and the parties personally liable were not able to pay the deficiency which might arise upon a sale, it was held that the court below did not err in appointing a receiver of the rents and profits. The doctrine that a receiver may be appointed under circumstances sufficiently strong and clear in a suit to foreclose a mortgage is also recognized by the Supreme Court of Iowa in Callahan v. Shaw, 19 Iowa 183. In Henshaw v. Wells, 9 Hump. 568, the Supreme Court of Tennesee affirmed a decree appointing a receiver in foreclosure proceedings. In New Jersey the courts will not appoint a receiver simply because the mortgagor is insolvent and the security insufficient, but they will when coupled with these facts are circumstances of fraud or bad faith in appropriating the rents for other purposes than keeping down the interest or when the security has materially depreciated in value. Cortleyeu v. Hathaway, 3 Stock. 41.

It is held in California that in a foreclosure suit the plaintiff has no right to have a receiver of rents and profits of the mortgaged property appointed, but that decision is based on a peculiar statutory provision of that State which expressly confines the remedy of the mortgagee to a foreclosure and sale. Guy v. Ide, 6 Cal. 99.

We take it then to be undoubted law that the court of chancery may when the security is inadequate and the mortgagor unable to pay the deficiency and a foreclosure proceeding is pending, appoint a receiver if there are circumstances of fraud or bad faith on the part of the mortgagor or other facts involved which would render a denial of the relief sought inequitable and unjust.

It is not necessary for the decision of the case before us we should express an opinion as to whether such appointment should be made where circumstances and facts such as we have referred to do not exist in conjunction with the two elements first spoken of and it will be time enough to dispose of that question when it arises.

It is objected in this case that the appointment was made after decree of foreclosure and after sale and before the time allowed by law for the redemption of the premises had expired. It is urged by appellants that appellee had exhausted his security by a sale of the mortgaged premises, and the statute gave them twelve months for redemption, and it is claimed that implies the receipt of the rents, issues and profits during that time to enable them to pay off the incumbrances.

In Bowman v. Bell, 14 Simons, 392, the English High Court of Chancery appointed a receiver on motion after a decree and though not prayed for by the bill. It is stated by High, in his treatise on the law of Receivers, section 110: "While it rarely happens that courts are called upon to appoint a receiver after a final decree in the cause, the power of appointment after decree is well settled and is exercised in cases of great emergency or where the relief is indispensable for the protection of the parties in interest." And Wright v. Vernon, 3 Drew, 112, and other English authorities are cited as supporting the text. In Thomas v. Davies, 11 Beavan, 29, a case calling very strongly for such relief, a receiver of the rents of the mortgaged premises was allowed after a decree of foreclosure.

In Hyman v. Kelley, *supra*, there had been a judgment of foreclosure and the premises had been sold under it and bid in at the sheriff's sale by the plaintiffs for less than the amount of their debt, and the six months allowed by statute had not expired and the plaintiffs were not invested with title under the statute and yet it was held, under the circumstances of that case, that the motion for a receiver should have prevailed, and the judgment of the court below was reversed.

Astor v. Turner, 11 Paige, 436, is a still stronger case. There the premises had been sold by the master and bid in by the complainant, leaving a deficiency of $600 due upon the decree. The appellant was the owner of the equity of redemption, and was in possession of the premises by his tenants at the time of the sale. By the terms of the decree the purchaser was not entitled to the possession of the premises until after the rents

would become due and payable. The mortgagor being insolvent, the vice-chancellor directed a receiver of those rents to be appointed, and that they should be applied to the payment of the deficiency remaining due upon the decree. On appeal, Chancellor Walworth said: "He was clearly right." If the purchaser had been entitled to the immediate possession of the premises, the rents, which fell due the next day, would have belonged to him. The legal presumption in that case would have been that he had purchased in reference to such right, and had given more for the premises than he otherwise would have done on account of such rents and profits. Here, however, the purchaser was not entitled to the rents which would become due before his right to the possession of the premises was to commence, even if the order to confirm the master's report should be entered immediately, and if there had been no deficiency, those rents would have belonged to the owner of the equity of redemption. But the mortgagee had an equitable right to such rents to pay the deficiency, which right could only be enforced by an application to the court to appoint a receiver. The final decree stands in full force. And the order to apply these rents towards the deficiency due from an insolvent mortgagor is merely a collateral remedy against this fund, which, in equity, was secondarily liable for the payment of such deficiency. Substantially to the same effect is Howell v. Ripley, 10 Paige, 43.

When a court of chancery obtains jurisdiction of the subject matter of a suit, it will retain jurisdiction until complete justice has been done between the parties; and such jurisdiction is frequently exercised in case of a foreclosure of mortgage after final decree of sale by putting the purchaser in possession, by rendering a decree for any residue unpaid after sale of the property, and awarding execution therefor and in other ways. Of course, in the matter of an application such as we are now considering, no order of the kind here made should be entered after final decree, without due notice, if notice is practicable to the opposite party in interest. But no question of notice properly here arises, as the appellants were fully heard upon the matter and introduced numerous affidavits, which were considered by the court before finally determining as to the appointment of a receiver.

The necessity for the appropriation of the rents to the payment of the mortgage debt, may frequently not appear until after both decree and sale. The amount due is often matter of dispute, and can only be determined by the decree; and what the property will sell for can only be ascertained with certainty from the result of the judicial sale. If an appropriation of the rents on the indebtedness is justified by the surrounding facts before sale, we see no good reason why the same, and more weighty facts existing after sale, may not warrant a similar procedure. The security plainly is not exhausted by the sale, for there is a fund included in it which is secondarily liable. It is true, the mortgagee has elected to foreclose and sell, but then he has proved that remedy to the end, and without getting satisfaction of his debt, and he may avail himself of any just and equitable means of collecting the residue. Not that he may have such extraordinary remedy in all cases of a deficit in the proceeds, but only where it is indispensably necessary for his protection and just and equitable.

We hold, then, both upon the principles of equity that lie at the foundation of the chancery court and upon authority, that a receiver may sometimes be allowed after decree and sale, and that a mortgagee does not in all cases exhaust his security by a foreclosure and sale. It is, however, a power that the chancellor would be slow to exercise, except in an extreme case, and to prevent palpable wrong and injustice.

The points made that the court will not appoint a receiver on the application of a party who has the power of protecting the property without it, and that appellee has his remedy by asserting his title in a court of law, do not strike us with much force as applied to the matter now in hand. It is true it appears from affidavits that appellee claims ownership of the premises under deeds based upon a mechanic's lien proceeding, and upon a sale made under a prior incumbrance. But these claims are contested, and both appellants swear in their affidavits that the title to said real estate is in the appellant, Elizabeth Haas. The titles of appellee are not displayed in this record, and we are unable to determine therefrom that it has such title as it could effectually assert in the law court. Besides, such alleged titles grew out of subject-matters wholly disconnected with this suit, and are independent of the right here involved, and equity having once obtained jurisdiction will retain the same, notwithstanding appellee may have since acquired some legal right by which he could get possession in the law court.

Counsel for appellants make no points in their brief upon the questions of fact involved. We have examined the affidavits submitted on the motion and contained in the record. The decided weight of the testimony shows the mortgaged premises are a grossly inadequate security for the mortgage debt. The decree of the court was for $27,763 95, and appellee purchased the property at the sale for $19,000, leaving a balance of $9,079 95 unpaid. The amount bid seems to have been about the value of the property. Then there were three prior incumbrances amounting to $5,000, and a mechanics' lien for $335 65—all this without calculating any interest on the decree, which was entered in January, 1875, and without taking into consideration several years of accumulated interest on the other incumbrances. Appellants allowed the premises to be sold on some of these claims, and appellee was forced to buy them in to protect its interests. Appellants have failed to pay the taxes for years, and appellee has been compelled to pay $580 80 taxes thereon, and there was at the time the motion was submitted $613 56 unpaid taxes due. Appellee also paid $487 85 for insurance on the buildings, but the conduct of Elizabeth Haas was such that the companies refused to reinsure, and one of them cancelled its policy. Appellants prosecuted an unsuccessful appeal from

the decree of foreclosure to this court, and have from the date of the decree been in possession of the premises by their tenants, and have collected the rents and have used them as a means of support for the family, allowing interest on the several liens to accumulate, and leaving the taxes wholly unpaid, and allowing some of the incumbrances to culminate into what may be a valid legal title. It is evident that they have no ability to, or intention of, redeeming the property, and are seeking to make all out of it they can, and render it as little available to appellee as possible. The statements in their affidavit seeking to question the amount due appellee, and for which decree was rendered, avail nothing, as that matter is *res adjudicata*.

Under the peculiar circumstances of the case, we cannot say the order of the circuit court appointing a receiver was erroneously made, and the judgment of that court must be affirmed.

KANSAS STOCK LAW—RAILROADS NOT REQUIRED TO FENCE AGAINST HOGS.

ATCHISON, ETC., R. CO. v. YATES.

Supreme Court of Kansas.

[Filed April 24, 1879.]

IN all the townships of this State where the statutes are in force, preventing swine from running at large: *Held*, that railroad companies are not required to fence against hogs. This is upon the ground that, as lawful fences will not prevent such animals from being on the road-bed, and will not protect the railroad track from them, no obligation exists to erect them.

In error from Douglas County.

Ross Burns and *J. G. Waters*, for plaintiff in error; *William A. H. Harris*, for defendant in error.

This was an action under the railroad stock law of 1874, to recover for the killing of two hogs. The court made the following findings of fact:

"1. The defendant (now plaintiff in error), was during the whole of the months of October and November, 1877, operating a line of railroad through Wakarusa township, in Douglas county, Kansas. 2. That the line of defendant's railroad, and its right of way, runs through the field of plaintiff in said town ship, which field is surrounded by a legal fence, and which is hog proof. 3. That the defendant is a railroad corporation, duly incorporated and organized under the laws of the State of Kansas. 4. That while plaintiff's (defendant in error) hogs were kept in the enclosed field during the months aforesaid, two hogs belonging to the plaintiff, of the value of thirty dollars, were killed by the engines and trains of defendant, and in the operation of its line of railroad. 5. That said hogs were killed within the limits of said field. 6. That the line of defendant's railroad was not fenced at any place within said Wakarusa township. 7. That no demand was ever made upon any station or ticket agent of the defendant for the value of said hogs. 8. That a demand was in proper time made upon the agent of the defendant, whose duty it was to settle stock claims, and to whom all claims of this kind were referred for adjustment and settlement, and who had full power and authority to compromise, settle and pay such claims. 9. That on such demand being made the defendant, by its said stock agent, refused to pay for the same, and still refuses so to do. 10. That fifteen dollars is a reasonable attorney's fee for the prosecution of this suit. 11. That said hogs were not killed by any negligence of defendant, unless the failure to fence its track is negligence."

Judgment was rendered by the court in favor of the defendant in error, and the railroad company brings the case here on error.

HORTON, C. J., delivered the opinion of the court:

The learned judge in the court below mistook the law in reference to this case, in rendering judgment on his findings of fact against the railroad company. The stock law of 1874, exempting railroad companies from its conditions, when their roads are enclosed with a good and lawful fence, is to be construed in connection with the fence law in force. The rule *in pari materia* applies. In other words, railroad companies are not required to build different fences from other parties. The fence spoken of in the stock law is no different or more expensive a structure than that mentioned in the general law defining a legal and sufficient fence. Gen. Stat., ch. 40, 486-487. In townships where hogs are permitted to run at large, the bottom rail, board or plank of which the fence is composed shall not be more than six inches from the ground; in other townships it shall not be more than two feet. In the law there is no prohibition against building fences of rails or lumber, and, when constructed of this material, as required by the law, they are lawful fences. There is no finding to show that in Wakarusa township swine were allowed to run at large. The general law of the State is that they shall not run at large. Assuming the general law of the State was in force, then the railroad company, in any event, was only bound to build a fence through the enclosure of Yates with the bottom rail, board or plank not more than two feet from the ground. Sec. 1, ch. 88, Laws 1873. Such a fence would not have prevented the hogs killed from being on the road; indeed, the fence thus constructed, and being within all the requirements of the law, a good and lawful fence would have in no respect been of any benefit to the proprietor of the land, so far as keeping his hogs from the track. Then, if such a fence was useless and unnecessary, so far as this case is concerned, can it be logically said that the company ought to have built its fence? Or that from its failure to construct a fence which would not keep the animals killed from going upon the road, it was liable under the law of 1874? We answer, no. The building of a dozen, or any other number of fences of the character required by law in Wakarusa township, would have afforded no protection to the defendant in error, and he has no serious complaint of their absence. As a lawful fence could not have prevented the injury, and would not have protected the railroad track from

the swine, no obligation existed to erect it. The failure to erect the fence may be laid aside as having no bearing in the case.

We conclude that the company was rightfully in the field with its road and cars; that it was not bound to do a useless or unnecessary act; that, therefore, as to hogs, it was not bound to maintain a fence. As the findings show they were not killed by any negligence, unless the failure to fence the track was negligence, the company was not liable.

The judgment will be reversed and the case remanded, with the direction that judgment be entered upon the findings of fact for the plaintiff in error. All the justices concurring.

ABORTION.

STATE v. FITZGERALD.

Supreme Court of Iowa, October Term, 1878.

1. THE EMPLOYMENT OF ASSOCIATE COUNSEL in criminal prosecutions rests in the discretion of the court and district attorney.

2. ABORTION — WHAT CONSTITUTES. — Under the Iowa code, as to administering medicine with intent to produce a miscarriage, the crime is complete if the attempt be made at any time during pregnancy. It is not necessary that the woman should be quick with child.

3. SAME—INTENT.—A person administering a substance with intent to produce a miscarriage may be convicted, although the substance used is proved to be harmless. It is the *intent* and not the *substance* that constitutes the crime.

4. HUSBAND AND WIFE — COERCION.—Proof that the prisoner was a married woman, and that the criminal act was done in the presence of her husband, raises a presumption of coercion, which may be rebutted by proof that the act was done while she was not so immediately near him as to be under his control.

APPEAL from Mahaska District Court.

The defendant, Ruth Fitzgerald, was indicted for willfully administering to a pregnant woman a drug and substance, and using an instrument, and other means, with intent to produce the miscarriage of such pregnant woman. Upon a trial there was a verdict of guilty, and the defendant was sentenced to the penitentiary for nine months. Defendant appeals.

John F. Lacy for appellant; *J. F. McJunkin* Attorney-General for the State.

ROTHROCK, C. J., delivered the opinion of the court:

J. A. L. Crookham appeared at the instance of private parties to assist the district attorney in the trial of the cause. There was no order of the court appointing said Crookham as associate counsel. The defendant objected to his appearance, and objected to his making any argument in the cause, and to his taking any part therein. The objection was overruled, and the defendant insists that this ruling was erroneous.

We think the practice of allowing district attorneys to have the assistance of associate counsel in the trial of criminal cases has been too long acquiesced in in this State to be now called in question. Crookham did not appear as an assistant without the consent of the district attorney and the court. If he did, the objection to his taking part in the trial would have been sustained. We can see no objection to leaving the matter of allowing associate counsel in the discretion of the court and district attorney.

Section 3,864 of the code provides: "If any person with intent to produce a miscarriage of any pregnant woman, willfully administer any drug or substance whatever, or with such intent use any instrument or other means whatever, unless such miscarriage shall be necessary to save life, he shall be imprisoned, etc." The defendant asked the court to instruct the jury that the crime could not be committed upon a woman who was not quick with child. The instruction was, we think, correctly refused. The statute makes no such qualification. The crime consists in attempting to produce the miscarriage of any pregnant woman. The crime is complete, if the attempt be made at any time during pregnancy.

The evidence tended to show that the substance used in the attempt to produce miscarriage was tobacco, and that the instrument used was a syringe. The medical witnesses testified that tobacco was not such a substance as would produce the result intended. The court refused to instruct the jury that the defendant could not be convicted unless the substance administered was such as would produce a miscarriage.

In this we think there was no error. The statute provides that the administering of "*any substance*" with the criminal intent, shall constitute the crime. A party who, with the necessary criminal intent, uses any substance to produce a miscarriage, surely cannot be held innocent because he mistakenly administered a drug or substance which did not produce the result intended. It is the *intent*, and not the *substance* used, that determines the criminality. The name of the drug or substance used need not be given in the indictment. State v. Vawter, 7 Blackf. 592; Shotwell v. State, 37 Mo. 359; Com v. Morrison, 16 Gray 224.

The defendant is a married woman. There was evidence upon the trial tending to show that she went to the house where the complaining witness resided and induced her to go part of the way to defendant's house, stating that the defendant's husband wanted to see her, and that "if there was anything wrong he could bring her round." The parties met defendant's husband, who told the witness to come to him, which she did, and the defendant then went away. It was upon this occasion that the husband of defendant made the alleged attempt to produce the miscarriage. This occurred about May 1st, 1876. The State interrogated the witness as to conversation with defendant in October previous. She testified that defendant told the witness that she knew her husband had had criminal intercourse with the witness, and that she did not care. She also testified that defendant at an-

other time requested her to meet her husband. Objection to this evidence was overruled, and the same was admitted as tending to negative the presumption of coercion of the defendant by her husband.

The court, we think, correctly instructed the jury that a *prima facie* case of coercion was established when it was shown that the defendant was a married woman; and that the criminal act was done in the presence of the husband; and that this presumption might be rebutted by evidence that the acts of the wife were done by her while not in her husband's presence, or so immediately near him as fairly to be held under his control, and in his presence, Now, how the consent of the wife to the husband's illicit intercourse with the prosecuting witness months before the alleged crime was committed would tend to rebut the presumption of coercion, in the attempt to produce a miscarriage, we are at a loss to discover. True, it tends to show that the wife connived at her husband's adultery, but its effect would rather be to show that instead of acting independent of the coercion of her husband she was so entirely under his control as to consent to his adulterous intercourse with the prosecuting witness.

No wife of any individuality, self-respect or independence of thought or action, would consent to such a crime against herself.

In our opinion this evidence should not have been admitted. If it had no other tendency it was calculated to prejudice the defendant in the estimation of the jury. We are the more ready to so hold in view of the fact that the defendant showed, by quite a number of witnesses, that she was a woman of good character and reputation.

Other objections to the rulings of the court we do not regard as well taken, unless it may be the exception to the instruction upon the force to be given to the evidence as to the good character of the defendant. This instruction seems to be contrary to the rule established by this court, in the case of State v. Northrup, June term, 1878. The judgment is reversed.

HOMESTEAD EXEMPTION — "HEAD OF A FAMILY"—EVIDENCE.

WHITEHEAD v. TAPP.

Supreme Court of Missouri, April Term, 1879.

[Filed May 19, 1879.]

THE DOMICIL OF THE HUSBAND draws after it that of the wife; and a married man, whose wife has deserted him in another State, who removes to Missouri, and maintains improper relations with another woman, who lives with him here, is a house-keeper and head of the family, and, as such, is entitled to claim homestead exemption in house and lot used and occupied by himself and paramour.

Appeal from Jackson County Circuit Court.

Action of ejectment. Common source of title, one Arnes, who was owner of premises in controversy in August, 1871. Plaintiff claims by deed from Arnes, executed in September, 1872, and by regular claim of title from Arnes' grantee. Defendant claims title by virtue of sheriff's deed, executed in 1873, made in pursuance of execution founded on judgment against Arnes, December, 1871. When the indebtedness accrued upon which the judgment was rendered, Arnes had a wife living in Illinois, but had left her prior to that time, and had removed to Kansas City, where he purchased property, hired a woman to live with him as his housekeeper, paying her as compensation therefor "her victuals and clothes," and continued to reside on that property until he purchased, with a portion of the proceeds derived from sale thereof, premises in controversy, and afterwards continued to live on premises in dispute, without any family or any person dependent upon him for support, save the woman, who was his hired domestic, and so lived there at the time of the rendition of judgment against him, which was foundation of defendant's title. Arnes had no children, and his wife in Illinois never came to Missouri or resided here with him. Judgment for plaintiff, from which defendant appeals.

Moore & Tomlinson for respondent; *Ballingal & Gnume* for appellant.

SHERWOOD, C. J., delivered the opinion of the court:

The controlling question in this case is whether Arnes was the head of a family. This point is established unmistakeably by the evidence that he had a wife living in Quincy, Illinois, who had deserted him for another. This desertion on the part of the wife, did not, however, sunder the existing marital relation, or make Arnes any the less a house-keeper, or head of a family, than he was prior to that occurrence. The recent case of Brown v. Stratton, 8 Cent. L. J. 46, decided at the last term, is directly in point.

Anterior to the date of obtaining a divorce from his first wife it was perfectly within Arnes' power to have forgiven her short-comings, and condoned her roving fancy; and the mere fact that this never occurred did not alter the *status* of the parties, *enter se*. Arnes was still a married man, and consequently the head of a family—being so, evidence that improper relations were maintained between Arnes and the woman who lived with him in the same house with him, was irrelevant and properly rejected—since the domicil of the husband draws after it that of the wife, and so soon as it became the homestead of the husband, it became also the homestead of the wife,—and that, too, though the wife lived in another State. Thompson on Homesteads, § 259, and cases cited. Under this view it becomes unnecessary to closely scrutinize the instructions given for plaintiff or those refused defendant, and we affirm the judgment. All concur.

IN *Jordan v. Eve*, 3 Va. L. J. 290, it was held that a public highway through lands is not within a covenant against "incumbrances."

SOME RECENT FOREIGN DECISIONS.

LIFE INSURANCE—CONCEALMENT OF MATERIAL FACT — PROPOSALS TO OTHER OFFICES. — *London Assurance Co. v. Mansel.* English High Court, Chy. Div., 27 W. R. 444.—1. In contract of life assurance the not fairly answering a question as to proposals made to other offices is concealment of a material fact sufficient to avoid the contract. 2. Where there was appended to the question, and signed by the proposer, a declaration that the above written particulars were true, and an agreement that they should be the basis of the contract: *Held*, on the authority of Anderson v. Fitzgerald, 4 H. L. C. 484, that the proposer could not contend that any question was not material.

CHARITABLE BEQUEST—EQUIVOCAL DESCRIPTION —EVIDENCE OF INTENTION.—*Fearn's Will.* English High Court, Chy. Div., 27 W. R. 392. A testatrix bequeathed a legacy to the treasurer "of the society for the propagation of the Gospel among the Jews," in aid of the general purposes of that society. There was not any society with this exact name; but there were two societies for the purpose indicated in the description, namely: "The London Society for Promoting Christianity among the Jews," and "the British Society for the Propagation of the Gospel among the Jews." *Held*, (1) that there was an equivocal description of the society to be benefited so as to render evidence of intention admissible; and (2), that the fact that the testatrix had, on one occasion, subscribed to the London society, was sufficient to turn the scale in favor of that society.

COVENANT WITH "OWNERS OR OWNER" OF CERTAIN LAND—LESSEE WHETHER "OWNER" WITHIN THE COVENANT.—*Taite v. Gosling.* English High Court, Chy. Div. 27 W. R. 394. Where the purchaser of a piece of land covenanted with the vendors, and also with the "owners or owner of any other land" to which the benefit of the covenant extended, not to carry on certain trades on the purchased land, and afterwards began to carry on one of such trades there, *Held*, that a lessee of a portion of the land, entitled to the benefit of the covenant, was an "owner" of the land within the meaning of the covenant, and entitled to an injunction to restrain the breach.

WILL—CONSTRUCTION—"CHILDREN"—ILLEGITIMATE AND LEGITIMATE CHILDREN.—*Ellis v. Houston.* English High Court, Chy. Div., 27 W. R. 501. Where a will contains a gift to the "children" of a person, and there is no indication on the face of the will of any intention to include illegitimate children, the court will disregard all circumstances, however strong, from which an intention to include illegitimate children might be inferred. Lake v. Hornden, 24 W. R. 543. L. R. 1 Chy. Div. 644, doubted.

HUSBAND AND WIFE—AGREEMENT TO LIVE SEPARATELY NOT ILLEGAL—INJUNCTION.—*Marshall v. Marshall.* English High Court, Prob. and Adm. and Div. Div., 27 W. R. 399. A deed of separation between husband and wife is not contrary to public policy, and may be a good answer to a suit for restitution of conjugal rights. HANNEN, P.: "The legality of a covenant not to sue for restitution of conjugal rights being clear, the next question is whether a court of equity would enforce it by injunction restraining its breach. It appears to me that this question also is now concluded by authority which is binding upon me. In Hunt v. Hunt, 10 W. R. 215, 4 De G. F. & J. 221, on appeal from the late Master of the Rolls, Lord Westbury held that a covenant by a husband not to sue for restitution of conjugal rights could be enforced by a court of equity by restraining the husband from proceeding in a suit in the divorce court. It is true that in Hunt v. Hunt, the husband was restrained, and not the wife; but the question whether a wife could be so restrained was raised in that case, and the supposed immunity of the wife from injunction against prosecuting such a suit as the present was assumed by the Master of the Rolls, and formed one of the grounds of his judgment. It is clear, however, that Lord Westbury did not adopt this view, but considered that Hill v. Turner, 1 Atk. 515, was an authority establishing that a court of equity has jurisdiction to grant an injunction against a *feme covert* to restrain her from suing in the Ecclesiastical court for restitution of conjugal rights; and the observation of the late Master of the Rolls that the Lord Chancellor there intended to confine his interference to a question of property does not appear to me to be well founded. If he had so intended he might have limited his decree to restraining the enforcement of any claim to alimony, instead of which he added to the injunction for that purpose an injunction restraining the wife from proceeding for restitution of conjugal rights. Considering, therefore, that I am bound by Lord Westbury's decision in Hunt v. Hunt, I hold that the respondent's answer is sufficient."

ABSTRACTS OF RECENT DECISIONS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

January-March, 1879.

PROMISSORY NOTE—BONA FIDE HOLDER.—L indorsed in blank an unsigned promissory note in the words, "we promise to pay to the order of L," etc., and left it with his book-keeper with instructions to deliver it to N upon his signing the name of his firm; and the book-keeper delivered it to N, who signed it with his own name alone, and then procured and afterwards erased the name of S as an additional maker, and sold the note to the plaintiff, who bought it in good faith. The judge, before whom the case was tried without a jury, found, as a fact, that the plaintiffs were not negligent in failing to observe the form of the note, or the erasure of S's name. *Held*, that the plaintiff could maintain an action on the note against L. Putnam v. Sullivan, 4 Mass. 45; Greenfield Sav. Bank v. Stowell, 123 Mass. 196; Angle v. Northwestern Ins. Co., 92 U. S. 330; Rice v. Gooe, 22 Pick. 158. Opinion by GRAY, C. J.—*Whitmore v. Nickelson.*

ACTION AT LAW—SUGGESTION OF BANKRUPTCY FILED ON DAY OF ENTRY OF JUDGMENT—REVIEW.—In an action pending in the superior court, an agreement by the attorneys of the parties, that judgment should be entered for the plaintiff on the "fifth day of July next," was made and filed in court. On the third day of said July, the defendant filed his voluntary petition in bankruptcy, and, on the fifth, about ten o'clock A. M., he filed a suggestion of his bankruptcy in the superior court. On the seventh, execution issued in said action, and, on the eighth of August following, the defendant petitioned for a writ of review, which was granted. To the writ of review the defendant in review pleaded in abatement, and the plaintiff in review filed a replication setting up his composition with his creditors in bankruptcy. The action in review was tried by the court without a jury, and the judge

found, as a matter of fact, that the suggestion of bankruptcy was filed before the rendering of the original judgment. *Held*, that if that suggestion had been brought to the notice of the court before the actual entry of judgment, the case must have been continued to await the results of the bankruptcy proceedings, and the suggestion could not have been defeated by an entry of judgment *nunc pro tunc*. U. S. Rev. Sts., § 5106; Ray v. Wright, 119 Mass. 426. And it was in the discretion of the court to grant a review for the purpose of enabling the proceeding in bankruptcy to be set up in defense. Gen. Sts., c. 146, § 21; Todd v. Barton, 117 Mass. 291; Shurtleff v. Thompson, 63 Me. 118. If the judgment could have the unjust operation contended for—*i. e.*, that it took effect at the earliest minute of the day on which it was entered, and, therefore, in law, took precedence of the suggestion, it was certainly within the discretion of the court to grant a writ of review in order to prevent that consequence. The previous agreement for the entry of judgment, though a waiver of a review as of right, could not control the discretion of the court in granting a review upon petition. Opinion by GRAY, C. J.—*Golden v. Blaskopf.*

MONEY HAD AND RECEIVED—PROMISSORY NOTES.—In an action for money had and received, the plaintiff testified that he went to the defendant with a promissory note of R & Co., payable to the order of, and indorsed by the plaintiff, and asked defendant to get said note discounted at defendant's bank, and allow the plaintiff to take the proceeds for his own use; that the defendant thereupon produced a promissory note of P & Co., payable to the order of, and indorsed by D, and offered to loan it to plaintiff, if that would answer the plaintiff's purpose; that the plaintiff said it would, and offered to give a receipt for the note, and that the defendant suggested that, in place of a receipt, he would retain the note of R & Co., and take the note of the plaintiff for the difference in amount between that note and the note of P & Co., and hold said note as collateral for the loan of the P & Co. note; that plaintiff assented to this proposal, and gave his own note for said difference to the defendant. The defendant claimed that the transaction was an exchange of notes, and objected to the above testimony as to the conversation between the parties at the time said note was given, on the ground that the admission of such testimony was an attempt to contradict by parol the terms of written instruments, and to any testimony in regard to the notes except to show a want of consideration, for which he claimed the P & Co. note was sufficient. The plaintiff had the P & Co. note discounted, and testified that, a few days before the other note became due, he learned that said notes were held by a bank, and that he then saw defendant, who said that he had used the notes, and that when the note of P & Co., who had failed before this conversation occurred, became due, he, the defendant, would take care of it. The plaintiff paid all of said notes at maturity, and offered the P & Co. note to defendant, and demanded of defendant the money paid on the other notes. *Held*, that the evidence was competent and admissible, and, if it were believed by the jury, it would follow that, on returning the P & Co. note to the defendant, the plaintiff would be entitled to take back and have returned to him the collateral security which he had previously deposited; that plaintiff could not be held responsible for the loss arising from the insolvency of P & Co.; that, by said evidence, the plaintiff might show a failure of consideration in regard to his own note; and that if the other notes were deposited simply as collateral, the defendant might be justly held accountable as for money had and received which equitably belonged to the plaintiff. Opinion by AMES, J.—*Mayo v. Peterson.*

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, February 22, 1879.]

MORTGAGE—POWER OF SALE—FORECLOSURE AND SALE BY ADMINISTRATOR OF DECEASED MORTGAGEE.—This is an appeal from a judgment for the plaintiff in a suit of forcible detainer, by William E. Lewis against Richard Munin, to recover possession of a certain quarter-section of land. Richard Munin and A. J. Munin, his son, had each, on May 25, 1869, executed to David Matthews separate mortgages of two-eighties of the quarter section to secure the payment of the purchase money therefor—promissory notes to Matthews being given by each purchaser for the purchase money of his own eighty. Default having been made in the payment of the notes, the mortgages were foreclosed by a sale of the mortgaged premises in pursuance of a power of sale given by the mortgages, Lewis becoming the purchaser, to whom deeds were accordingly executed, and he thereafterwards brought this suit for possession. It appeared that, after the execution of the mortgages, and before the foreclosure sale, David Matthews, the mortgagee, died, and the power of sale was exercised by his administrator. Objection is made that the power of sale conferred by the mortgagee could not be exercised by the administrator. SHELDON, J., says: "The power of sale was given to the mortgagee, his legal representatives or attorney. 71 Ill. 91, is relied upon in support of the objection, where, in the case of a trust deed, land being conveyed to a trustee, to secure the payment of indebtedness, with power upon default of payment to the trustee or his legal representative, to sell and convey the land as the attorney of the grantor, it was held that the administrator of the deceased trustee could not rightfully make the sale, and that, in that case, 'legal representative' meant a new trustee. But no such meaning can be attached to those words in the present case. The words here admit of no other application than to the administrator of heirs, and it was said in the case cited, that legal representative or personal representative, in the commonly accepted sense, means administrator or executor. See 31 Ill. 174; 54 Ill. 413. Upon the death of the mortgagee here, the notes then held by him passed to his administrator as his assignee in law, and the administrator stood in all respects as the legal representative of the mortgagee with respect to the notes; they were the principal thing, and the mortgage but the incident, and the power of sale was properly exercised by the administrator.—*Murrin v. Lewis.* Affirmed.

PRACTICE—APPEAL FROM APPELLATE TO SUPREME COURT—NECESSITY OF CERTIFICATE BY APPELLATE COURT.—This case was tried by the appellate court for the first district. It appears from the record that the case does not involve a franchise, a freehold, or the validity of a statute; nor is it a criminal case, and, if it appears that the amount involved is less than one thousand dollars, and the judges of that court, or a majority of them, have failed, on the petition of the parties, to certify that the case, although involving less than one thousand dollars; exclusive of costs, involves questions of law, of such importance, either on account of principal or collateral interest, as that it should be passed upon by this court. Nor has the appellate court certified to this court the grounds of granting the appeal. It is only on one of the grounds enumerated in the statute creating or conferring jurisdiction and regulating the practice of the appellate court, that there is any power to grant an appeal so as to confer jurisdiction on this court; and it fails to appear, from the transcript from the appellate court, that any of the statutory grounds exist which authorize this appeal. It therefore follows that the effort

of the appellate court to grant the appeal was unauthorized, and did not become effective to confer any jurisdiction on this court. PER CURIAM. Appeal dismissed.—*McGurick v. Burry.*

NEGLIGENCE — INJURY IN CROSSING RAILROAD TRACK—RULE AS TO COMPARATIVE NEGLIGENCE.—This was a suit by the plaintiff against the Chicago, Burlington & Quincy R. Co. to recover damages for the killing of one A while crossing the track of defendant. Plaintiff recovered and defendant appeals. Appellee's first instruction informed the jury that, although the deceased did not observe the precautions which an ordinary prudent man would have observed before attempting to cross defendant's track, still there may be a recovery, if the jury shall believe from the evidence, that this negligence of the deceased was slight in comparison with that of the defendant." SCHOLFIELD, J., says: "The doctrine of comparative negligence, recognized by this court, is that, although the plaintiff may have been guilty of slight negligence, contributing to the injury complained of, this will not bar a recovery, provided the negligence of the defendant, resulting in the injury, was gross in comparison with that of the plaintiff. The cases in which this doctrine has been announced are numerous. Notwithstanding the expression of one of these terms of comparison may imply its correlative, to avoid misleading the jury it has been held both terms should be expressed in all instructions assuming to lay down the rule. The jury must be told to authorize a recovery, it must appear from the evidence that the negligence of the plaintiff is slight, and that of the defendant gross, in comparison with each other; and it will not be sufficient simply to say the plaintiff may recover, though negligent, provided his negligence is slight in comparison with that of the defendant. See 72 Ill. 351." Reversed.—*Chicago, etc., R. Co. v. Harwood.*

SUPREME COURT OF PENNSYLVANIA.

January—March, 1879.

FORGERY—DUTY OF COURT—EVIDENCE.—1. The interlineation of a lease to make it conform to what was the understanding and agreement of the parties at the time it was executed, is not such a fraudulent alteration as to make it a forgery. 2. A judge should exercise great care in commenting upon the evidence. 3. General evidence that defendant is a bad man is not admissible in a forgery case. Opinion by PAXSON, J. *Pauli v. Com.* 36 Leg. Int. 194.

LIABILITY OF RECORDER OF DEEDS—PRINCIPAL AND AGENT.—The mortgagor of certain premises was permitted by the conveyancer of the mortgagee, to obtain a search from the recorder of deeds upon the representation that he (the mortgagor, himself a conveyancer in good standing) "was in a hurry for the money, and could obtain the search more quickly." The recorder's deputy issued the search, knowing that plaintiff was about to loan money upon the faith of it, omitting a certain mortgage, upon the mortgagor's assurance that it would be satisfied out of the money to be received by him. The premises were sold under the omitted mortgage, and the money loaned by plaintiff wholly lost. In a suit to recover the loss, by the mortgagee against the recorder: *Held*, 1. That the mortgagor had not been made the agent of the plaintiff, mortgagee, for any purpose. 2. That plaintiff's conveyancer, being employed for the special purpose of preparing the papers and procuring the necessary searches, could not, without express authority, employ one or more agents under him so as to bind his principal. 3. That the recorder had no right to throw the disastrous results of the misplaced confidence of his clerk upon those who loaned their money upon the faith of his official certificate, and that the plaintiff was entitled to recover. Opinion by PAXSON, J.—*George Peabody Building Ass'n. v. Houseman.* 36 Leg. Int. 137.

SUPREME COURT OF MARYLAND.

[Advance Sheets of 49 Md.]

SLANDER — HUSBAND AND WIFE — CHARGE OF ADULTERY NOT ACTIONABLE PER SE—SPECIAL DAMAGE.—1. In suits for slander, pecuniary loss to the plaintiff is the *gist* of the action, and courts at an early day recognized a distinction between words *actionable*, and words *not actionable in themselves*. In the former, the law *presumes* pecuniary loss, whilst in the latter it is necessary to prove special damage to the plaintiff. 2. When one charges another with the commission of an offense, it must be such an offense as subjects the party to *corporal punishment*, in order to render the words actionable *per se*. 3. The crime of adultery is not so punishable, and hence to charge one with adultery is not actionable *per se*, and the plaintiff must prove special damage. 4. Special damage in such cases is that which is naturally the consequence of the words spoken, and not such as is occasional and accidental. Sickness of the person slandered, resulting from the slanderous charge, is not sufficient to prove special damage. Opinion by ROBINSON, J.—*Shafer v. Aralt.*

CONSTRUCTION OF WILL—"MATURITY" OF FEMALE—CONSTRUCTION OF "OR."—1. The will of Richard Biddle contained the following clause: "*Item.* I furthermore give and bequeath to the aforesaid Laura L. Biddle the sum of $2,800 in cash, which sum is hereby directed to be placed at interest, according to the wise discretion of her guardian, and the interest arising therefrom to be appropriated to the benefit and support of said Laura during her minority, and when at lawful age, the aforesaid sum of $2,800 must be paid over to her in good faith. It is provided, however, that in the event of death of the aforesaid Laura L. Biddle before maturity or without issue, then, in such case, the money thus bequeathed to her shall revert to the children of George R. Carpenter and Leonis, his wife." Laura died aged nineteen years and some days, intestate, and without issue, never having been married. *Held*, (1.) That the testator, by the word "*maturity*," meant the same thing as he had before expressed by the words "*lawful age*," the time by him designated for the payment of the legacy; which lawful age, under the provisions of sec. 142 of art. 93 of the Code, is eighteen years. (2.) That Laura Biddle having attained the age of eighteen years, the legacy became vested in her absolutely, and was not divested by her subsequent death without issue. 2. It has been settled by repeated decisions in this State, that in a devise or bequest of the kind in this case, in order to effectuate the general intent of the testator, the word "*or*" must be construed to mean "*and*," so that the limitation over can not take effect, except upon the happening of both contingencies. Opinion by BARTOL, C. J.—*Carpenter v. Boulden.*

CRIMINAL LAW—HOMICIDE—EVIDENCE—PRACTICE ON APPEAL.—1. On an indictment for murder, prisoner's counsel offered to prove by the widow of the murdered man that her husband was jealous of her, and had accused her of being too intimate with other men than the prisoner, and stated to the court at the time of the offer that he proposed to follow up this proof by evidence tending to prove that the killing for which the prisoner was indicted grew out of a quarrel between the

prisoner and deceased, occasioned by the deceased having charged the prisoner with being too intimate with the wife of the deceased. *Held*, (1.) That the proof offered, whether considered by itself or in connection with the evidence with which it was proposed to follow it up, was inadmissible. (2.) That the general reputation in the neighborhood that the deceased was jealous of his wife, could not possibly furnish any explanation of the circumstances under which his life was taken, and was therefore not admissible in evidence. 2. A motion in arrest of judgment after verdict, for alleged defects in an indictment for murder, can not be sustained, such defects being the proper subject of a demurrer. And the only mode of bringing up to the court of appeals the points raised by such motion, is by a proceeding in the nature of a writ of error. Opinion by GRAYSON, J.—*Costley v. State.*

SUPREME COURT OF INDIANA.

November Term, 1878.

BREACH OF MARRIAGE CONTRACT—PLEADING.—In an action by a woman for the breach of a contract of marriage, it is not necessary for the plaintiff to aver that she requested the defendant to marry her, a promise to marry on a particular day being alleged. Where nothing is said as to the place, in such contract, the house of the prospective bride would, *prima facie*, by the custom of society, be the place contemplated for the marriage; and, by that custom, it would be the duty of the groom to present himself at the place without special request to fulfill the marriage engagement. The man is *ducere uxorem*. 2. Pars. Cont., 6th ed., p. 61; 2 Chitty Plead. 205; 108 Mass. 324. In such case, it being averred in the complaint that there was a mutual promise to marry, and that the plaintiff was ready on her part to fulfill the engagement, these averments must be proved. In such case evidence of preparations for performing the contract, made by the plaintiff in the absence of the defendant, and not in any way connected with him, is inadmissible to prove the plaintiff's assent to a mutual promise of marriage. Opinion by PERKINS, J.—*Graham v. Martin.*

JUDICIAL OFFICER—LIABILITY FOR FRAUD—CONCLUSIVENESS OF JUDGMENT.—This was a suit upon the official bond of a justice of the peace, alleging the fraudulent entry of a judgment in favor of the relator for $66, when it should have been for $166. *Held*, the judgment was conclusive and could not be attacked collaterally, either in a pleading or by evidence. *Held*, also, that judicial officers, as judges of courts and justices of the peace, although they may be impeached for corrupt actions, can not be held pecuniarily responsible to the party injured. A stranger to the record may attack a judgment for fraud in obtaining the judgment (not for fraud in the course of action), because, not being a party to it, he can not appeal; but in no case can even a stranger attack a judgment for fraud in the judge or justice who rendered it, much less a party to the judgment who can appeal. Opinion by BIDDLE, J.—*Kress v. State.*

FRAUD IN EXECUTING LEASE—PLEADING—COUNTERCLAIM.—Suit by appellee against appellant, on a promissory note executed by the latter for the rental of certain land leased to him by appellee. The appellant answered, by way of counterclaim, that he was induced to lease the farm and give the note by the false and fraudulent representations of the lessor, that the land was thoroughly underdrained and suitable for tillage, both in wet and dry seasons, whereas the land was not underdrained, and was unsuited for tillage in wet seasons. The answer alleged, further, that the appellant, prior to the execution of said lease and note, had no means of ascertaining the falsity of said representations, and relied upon the same as true. He prayed for damages against the plaintiff, etc. *Held*, the appellant had a right to maintain an action for damages for the fraud, and recover such damages upon a counterclaim in the action by the fraudulent lessor to recover the price agreed to be paid upon the lease, and it was error to sustain a demurrer to such answer. Opinion by PERKINS, J.—*Norris v. Tharp.*

SUPREME COURT OF RHODE ISLAND.

[Advance sheets of 12 R. I.]

OPINION EVIDENCE—EXPERTS.—1. In proceedings to obtain compensation for damages when land has been condemned to a public use, witnesses will not be allowed to give their opinion as to the amount of damage suffered. Tingley v. City of Providence, 8 R. I. 493, affirmed. 2. A farmer may, as an expert, give his estimate of the value of farm land of realty so condemned, but his opinion generally of the value of such realty is inadmissible, since the market value of a farm may be much greater than its agricultural value. Opinion by DURFEE, C. J.—*Brown v. Providence, &c., R. Co.*

CONFLICT OF LAWS.—H sold to J certain goods. The sale took place in Rhode Island, and the contract was valid there. The delivery was to take place in New York, and the contract was invalid by the statute of frauds of that State. In assumpsit brought by H against J for breach of this contract: *Held*, that H was entitled to recover. Opinion by DURFEE, C. J.—*Hunt v. Jones.*

PROMISSORY NOTE—ILLEGALITY—ACTION.—A and C made a bet on the presidental election and deposited the stakes with W. Afterwards, becoming dissatisfied with the stakeholder, they demanded their money and received W's note for the amount, with two indorsers. A had the note discounted at bank, and, while it was in bank, assigned it to the plaintiff. The note went to protest. In an action by the plaintiff against W and his indorsers, the jury found that the plaintiff was not a *bona fide* holder for value and without notice. *Held*, that the plaintiff could not recover. *Held*, further, that the note was tainted with illegality on its origin, and could therefore be good only in the hands of a purchaser for value in good faith and without notice. Opinion by DURFEE, C. J.—*Atwood v. Wieden.*

PRACTICE—OFFICER ACTING AS AGENT.—A statute prescribed the form of an affidavit to be indorsed on all writs of attachment. This statute being in force, an officer first made the required affidavit as the plaintiff's agent, and then as officer served the writ by garnishment: *Held*, that his act, although improper, was not illegal, and that the attachment was valid. DURFEE, C. J.: "The statute permits the affidavit to be made either by the plaintiff himself, or by his agent or attorney, and, therefore, if the officer was the agent of the plaintiff, the affidavit made by him was legal. We strongly disapprove the practice of such affidavit-making by officers, on account of its liability to abuse; but we are not prepared, on that account, to go so far as to hold that, as a matter of public policy, an officer is incapable of making the affidavit. It is not for the court to interpolate such an exception into the statute without some stronger reason. We likewise think the officer was not incompetent to serve the writ because he was the plaintiff's agent. A writ can not be served by an

officer who is a party to it. Gen. Stat. R. I. c. 195, § 4. The defendant's counsel argues from this that it can not be served by the plaintiff's agent because the act of the plaintiff's agent is in legal contemplation the act of the plaintiff himself. The argument is not valid. The act of the agent is the act of his principal only when it is performed in his capacity as agent. An officer in serving a writ does not act as the plaintiff's agent. He is a minister of the law, executing its precepts. The fact that he is the plaintiff's agent for other purposes does not incapacitate him for so ministerial a function. It is very common to employ an officer to make a demand, where a demand is necessary or expedient before suit; but no one ever supposed that such an employment incapacitated the officer from subsequently serving the writ, yet if agency incapacitates, why not? It is agency in the matter of the suit, like making the affidavit, though doubtless less liable to abuse."—*Carroll v. Sheehan.*

SUPREME COURT OF MISSOURI.

October Term, 1878.

[Filed March 25, 1879]

INSURANCE.—WAIVER OF FORFEITURE FOR NON-PAYMENT OF PREMIUM.—Action by widow on life-insurance policy issued by defendant, on life of her husband. Judgment for plaintiff for amount of policy, from which defendant appeals. There was evidence on part of plaintiff to show that defendant waived the prompt payment of the last semi-annual dividend due August 1st, 1872. That no forfeiture of policy for non-payment thereof was declared, nor any act of the company, or entry on its books, treating the policy as a cumulated policy, was done or made prior to death of insured. It was also shown that on several occasions, when previous semi-annual payments became due, the insured was indulged by company, and permitted to make payments after they became due, defendant taking no steps to declare the policy forfeited or commuted. *Held* (1.) If it was the intention of the company rigorously to enforce against assured provisions of policy in regard to the semi-annual premium, due August 1, 1872, it was its duty, and fair dealing required it, to notify him of such purpose. He was not notified and no entry was made on books of company, or on the policy then in possession of defendant as collateral security for loan to assured that it had become or would be treated as a commuted policy, and considering the conduct of the company and its course of dealing with respect to prior semi-annual premiums, it would be tolerating gross injustice to allow the defense acted upon. The instructions given by the court embodied these views, which are fully sustained by the authorities. Thompson v. Ins. Co. 52 Mo. 469; Pilkington v. Ins. Co. 55 Mo. 173; Benton v. Ins. Co. 25 Conn. 542; White v. Ins. Co. 102 Mass. 330; Meyer v. Ins. Co. 51 How. Pr. 267; Ins. Co. v. Stanton, 57 Ill. 354. The provision in the policy was inserted for the benefit of the company which could waive a strict compliance, as well by any other act indicating such an intention, as by a formal written instrument to that effect. (2.) The motion for new trial on ground of newly discovered evidence, was properly overruled. The conversations and admissions made by insured, while very material evidence for the company, were known to the officers of the same before the trial, so far as one person to whom they were made was concerned, and the fact that the same admissions had been made to other persons, came to the knowledge of such officers after the trial, will not warrant a new trial, except in violation of all principle and precedents. Affirmed. Opinion by HENRY, J.—*Hanley v. Life Association of America.*

[Filed March 24, 1879.]

FRAUDULENT REPRESENTATION OF SOLVENCY OF MAKER OF PROMISSORY NOTE—EVIDENCE OF GENERAL REPUTATION AMONG TRADERS AND OTHERS ADMISSIBLE TO PROVE FACT OF INSOLVENCY.—Action to recover price of piano sold by plaintiff to defendant, in payment for which defendant transferred to plaintiff, by delivery, promissory notes of one Morris, which notes, plaintiff alleged, defendant falsely and fraudulently represented would be paid at maturity, well knowing, at the time, that Morris, who resided in Atchison county, Kansas, was wholly insolvent, and that said notes were worthless. It was further alleged that plaintiff had accepted said notes in payment, relying upon these representations. All the notes were reduced to judgment, and a return of *nulla bona* was made under each judgment. On trial plaintiff, with a view of showing that defendant had knowledge of the insolvency of Morris, "offered to prove by a witness who resides in Kansas City, that Morris was notoriously insolvent, by the statements made to him by merchants, bankers, and others in the city of Atchison, in which city defendant resided." This testimony was excluded, and judgment for defendant. The testimony offered is the only matter to be determined. *Held*, the offer made in this case is awkwardly worded and rather indefinite, but it may be considered as an offer to prove, not simply the statement made by bankers, merchants and others, to the witness, relative to the solvency of Morris, but the *fact* that Morris was notoriously insolvent, and that he knew such *fact* from the statements of the bankers and others to him in Atchison. According to the authorities cited, it was certainly competent to show that Morris was generally reputed to be insolvent, and the means of knowledge of witness would be a proper subject of inquiry on cross-examination. Benoist v. Darby, 12 Mo. 196; Dickinson v. Chisman, 28 Mo. 134; Lee v. Kilburn, 3 Gray, 594; Bartlett v. Decreit, 4 Gray, 113; Carpenter v. Leonard, 3 Allen, 32; Sheen v. Bumpstiad, 1 H. & C. Ex. Rep. 357. Reversed and remanded. Opinion by HOUGH, J. *Conover v. Berdine.*

MUNICIPAL CORPORATION — LEGISLATION — AUTHORITY OF CITY COUNCIL CAN NOT BE DELEGATED, NOR CAN CITIES ABDICATE CONTROL OVER PUBLIC PROPERTY HELD FOR CITY PURPOSES.—Suit upon municipal bonds of the City of Alexandria, dated in 1859-60, payable ten years after date, with interest to A. Maxwell, or assignee. Bonds were assigned to plaintiff in 1872. Bonds are not payable out of any particular fund, but are the absolute obligations of the city. City, in its answer, admitted the validity of the bonds, and stated that they were issued to Maxwell for a debt due him for construction of a public wharf for the city. Answer further averred that the city, under its charter, had power to erect, repair and regulate public wharves and docks, and for the sale of wharfage therefor, and to appropriate and apply the wharfage and dockage arising therefrom in payment of such bonds. The answer then set out a contract made November 5th, 1867, between Maxwell and the city, wherein the city leases to him the wharf for twenty years, to fix the rate of wharfage and under conditions, and authorizes him to collect for his own use and benefit all wharfage thereon for said period, in consideration of which Maxwell agrees that the receipt of said wharfage, and the rights and priveleges guaranteed to him therefor shall be a payment and discharge of the bonds and coupons hereinbefore described; and also agrees to keep a portion of the levee in repair, and to return the

wharf to the city at the end of said term of twenty years. The bonds were to be deposited with a third party named for safe keeping, and held in trust for the faithful performance of the contract by both parties thereto. Answer sets up this contract in bar to suit, and a counter-claim for wharfage actually collected. Reply admits the bonds were made for the purpose of constructing public wharves of city but denies that city had power to appropriate the wharf revenues to payment of bonds, or to lease the wharf, and avers the contract of lease is void for want of power in city to make it. Judgment for plaintiff for amount of wharfage actually collected by Maxwell and plaintiff, treating that as money had and received by them for use and benefit of city. Defendant appeals *Held*. It is well settled by judicial decisions in this State and elsewhere that the legislative power of a municipal corporation cannot be delegated to others. Such powers are in the nature of public trusts conferred upon the legislative assembly of the corporation for the public benefit and cannot be vicariously exercised Cooley Con. Lim. 204-5, City of St. Louis v. Clemens, 43 Mo. 403. City v. Clemens, 52 Mo. 138. By the charter of the City of Alexandria authority was conferred upon the City Council to erect, repair and regulate public wharves and docks and to fix the rate of wharfage thereat. Acts 1849, 352: Acts 1851, 393. No authority was given by the charter to the city to lease the wharf or farm out its revenue, or to empower any one else to fix the rate of wharfage. All these things were attempted to be done by the contract under consideration, and being wholly unauthorized, the contract was illegal and void. The legislative authority of the city council could not be delegated, nor could the city abdicate its control over the public property held in trust by it, for the benefft of the public. Dillon on Mun. Corp. Vol. 2, § 445. § 512: Ill. Canal Co. v. St. Louis, 2 Dillon, 84, 92; Oakland v. Carpenter, 13 Cal. 540; Gale v. Kalamazoo, 32 Mich. 344. There is no merit in objection to right of plaintiff to possession of bonds as assignee of Maxwell, nor any error in action of court on the pleadings. Affirmed. Opinion by HOUGH, J.—*Mathews v. City of Alexandria*.

BOOK NOTICES.

A TREATISE ON THE LAW OF RAILROAD and other Corporate Securities, including Municipal Aid Bonds. By LEONARD A. JONES, author of a Treatise on Mortgages. Boston: Houghton, Osgood & Co. 1879.

Those of the profession who have given attention to corporation cases, can not but have noticed the necessity for a work relating to the "securities," so-called, which corporations may issue. Judge Dillon's monograph on Municipal Bonds, and the chapter in Redfield's Railway Law, entitled "Railway Investments," have been all that the practicing attorney could find on this subject. Mr. Jones has written the work under review for the purpose of supplying this want, and says that, when writing his work on Mortgages, his attention was called to the peculiarities of corporate mortgages, and to the fact that the law applicable to them is in many respects different from that applicable to mortgages generally.

We notice a few inaccuracies: For example, in § 199, Cromwell v. County of Sac, 96 U. S. 51, 6 Cent. L. J. 209, is cited to sustain the proposition that the fact of overdue coupons being attached to a bond is not alone sufficient to affect the position of a purchaser of such bond; and the opinion is quoted to the effect that to hold otherwise would "throw discredit upon a large class of securities." First Nat. Bank v. Commissioners, 14 Minn. 77, is cited as showing that such a fact is "a circumstance sufficient to put a purchaser on his guard;" and towards the close of the section the well-known case of Murray v. Lardner, 2 Wall. 110, is cited on the question of bad faith on the part of the purchaser. Now, this sec. 199 is under the general heading "Mortgage Bonds of Corporations," but in it there is strange ignoring of the fact that Cromwell v. County of Sac involved county obligations not purporting to be secured by mortgage; and the same is true of the case in 14 Minn. In the Murray case, the Camden and Amboy Railroad bonds, which were in dispute, had no overdue coupons attached, so that no railroad bond case, or even mortgage bond case is cited, bearing upon the question as to whether the fact of overdue coupons being attached, would "affect the position of the purchaser" of such bond. In the opinion in Cromwell v. County of Sac, the rule that the purchaser of a bond before maturity buys it free from the equities, but that after maturity it is otherwise, is fully sustained.

In the Grand Rapids and Indiana bonds, in dispute, a case (not, however, cited by Mr. Jones in this connection), to which we shall refer, the provision was: "In case the Grand Rapids and Indiana Railroad Company shall, for the space of six months, make default in the payment of the semi-annual interest to become due on any, or either of the bonds, then, after the lapse of six months, the whole principal sum mentioned in each and all of the bonds shall immediately thereafter become due and payable, anything therein contained to the contrary notwithstanding;" and if, in that case, Sanders' transferor had not been a *bona fide* holder, the question would have been a different one from that actually presented, for Judge Van Vorst especially states that he considers the vendor to have been "a *bona fide* purchaser before maturity."

The coupon is but a repetition of the contract in respect to the interest. White v. V. & M. R., 21 How. 575; Dunham v. R. R., 1 Wall. 254; Stevens v. R. R., 13 Blatch. 412; Evertsen v. Nat. Bank, 4 Hun. 695; Kenosha v. Lawson, 9 Wall. 477. And applying the rule reiterated in Caylus v. R. Co., 10 Hun. 295, the question is not settled whether, when a mortgage given to secure railroad bonds states that, under certain circumstances, the principal shall be deemed to be due, and those circumstances have taken place, the purchaser of bonds with overdue coupons attached is not bound by the equities which may have attached since the occurring of those circumstances. Cromwell v. County of Sac decides nothing in regard to this question, so far as "mortgage bonds of corporations" is concerned.

The remarkable decision of Judge Van Vorst, rendered at a special term of the New York Supreme Court in Grand Rapids, etc., R. R. v. Sanders, 54 How. Pr. 214, is cited in § 209 to sustain the proposition that a *bona fide* purchaser of bonds which a company had pledged for a loan, can hold them for "at least" the amount he paid for them. We fail to understand why the words "at least" should be used in this proposition by Mr. Jones. Judge Van Vorst said "the defendant, by his purchase of said thirty-one bonds, and the coupons thereto attached, became, and now is, entitled to full and complete indemnity, *but nothing more*." We have put these last three words in italics, to contrast them with "at least;" and it will be noticed that the latter part of § 209 does not seem to convey that idea. On the trial of this case at special term, the authority of President Lomax to pledge the bonds was controverted but overruled, and this case might have been cited in support of section 85, if Mr. Jones had desired to add a *nisi prius* decision to that of the United States Supreme Court in Hatch v. Coddington, 95 U. S. 48. It is interesting to note that the general term of the New York Supreme Court reversed Judge Van Vorst's decision, and has recently rendered judgment for the full par of the bonds, and coupons and interest.

The necessity forever compelling the practitioner to see that his facts agree with the facts of the case he cites as sustaining his propositions of law, is nowhere more necessary than in railroad cases. It would never do to cite Widener v. R. Co., 1 W. N. 472, a peculiar Pennsylvania case, as authority against the rulings in Eaton, etc., R. R. v. Hunt, 20 Ind. 457, or Alexander v. Central R. Co., 1 Cent. L. J. 543, 3 Dill. 487, or as invalidating the proceedings taken under the Boston, Hartford, and Erie Berdell mortgage. And yet eminent counsel have, in the writer's hearing, claimed that the recent decision of the United States Supreme Court in Sage v. Central R. R. of Iowa, fully sustains the claim which some of our overgrown monopolies frequently make, that a minority of bondholders have no rights that a majority are bound to respect.

A great deal of the confusion which has arisen in the minds of both practitioners and writers, also, comes from their failing to notice that the so-called "mortgage or trust deed," executed by railroad companies, is both a "mortgage" and a "trust deed," and that it is the latter, strictly, when the trustee can and does act within its terms, but that it is the former when the trustee can not so act, and a court of equity can be called upon to foreclose at the request of those beneficially interested.

In collecting a large number of cases, Mr. Jones has been eminently succesful; and the various views held in different parts of the country of the meaning of words is very interesting. The United States Supreme Court, in 1859, indicated in Pennock v. Coe, 23 How. 117, its understanding of what is included in "all present and future to be acquired property," and reiterated, in 1877, the same in Shaw v. Bill, 95 U. S. 10; after further defining "property," in Wilmington R. R. v. Reid, 13 Wall. 264, and in Wilson v. Boyce, 92 U. S. 320, while Farmers Loan & Trust Co. v. Commercial Bank, 11 Wis. 207, 15 Wis. 424, and other cases, show that the Wisconsin court do not give the same definition to the little word "all," in which difference it was followed by the Vermont court in Brainerd v. Peck, 34 Vt. 496.

The subject of conflict of jurisdiction is discussed very fully, but we are rather surprised that Bill v. New Albany, &c., R. Co., 2 Biss. 390, should be so much relied upon, as the peculiar circumstances of that case render it almost unique; and this may also be said of Union Trust Co. v. Rockford, etc., R. Co., 6 Biss. 197.

The conflicting decisions regarding the legal status of rolling stock is discussed quite at length, as also the subject of liens "prior to those created by mortgage," foreclosure sales, and the rights of purchasers at such sales.

The subject of receiverships, including the rights and liabilities of receivers, and the question of the status of certificates issued by receivers, is discussed in six chapters; and nothing that we have ever met with illustrates more forcibly the tendency of "case law" to draw away the courts from the rules of equity which, following the law, held invariably that a court had no right to set aside a contract, except for fraud or other similar cause. This is not the place to discuss the rights of bondholders who, on their full reliance on a legal contract, advance money for creating what little there is of property pledged as security, only to find that some judge has "postponed" their rights to the claims of others who did not have such contract, and can not claim under one. We know very well the pleas of "necessity to preserve the property," etc., but we scarcely think the framers of the Constitution, when they were so particular as to prescribe that "*no State* shall pass a law impairing the obligation of a contract," imagined that "judge-made" law would strive to do what they intended the Constitution to prevent. It may be that, now-a-days, the tendency is to judge against contract rights; if so, it may be only a reminder that judges may be mortal and fallible.

The provisions of the different State statutes, as given in this volume, will be found of great service; and while we are not willing to give Mr. Jones' treatise the laudation some have given it, we think it will be of great service to the practitioner, as being the latest work—in many features the only work—on the subject, and as containing the titles of many cases not fully known to the profession at large. C. W. H.

NOTES.

HON. GEORGE W. MCCRARY has been nominated by the President to succeed Judge Dillon; the resignation of the latter is to take effect in September next.—— The elections of last Monday, for the Supreme Court of Illinois, made but one change on the bench of that court as at present constituted, viz.: John H. Mulkey in place of David J. Baker, who was not a candidate for re-election, but was elected the same day to his former position on the circuit. It is understood that Judge Baker will be appointed to the appellate court. ——Under an act of the late Legislature of Indiana, approved March 28, 1879, the Supreme Court of Indiana have appointed James S. Frazer, of Warsaw, Kosciusko county, David Terpie, of Indianapolis, and John H. Stotsenburg, of New Albany, to prepare a compilation and revision of the general statute laws of Indiana, and to suggest such amendments and alterations in any of said statutes. and to prepare such additional ones as they may deem proper; the revision to be completed, if possible, by September 1, 1880, and to be reported to the next General Assembly.—— Among the acts passed by the late Missouri Legislature are the following: A law to promote immigration to the State; a law for the propagation and protection of choice food fishes in the waters of the State; a law declaring life insurance policies non-forfeitable after two premiums shall have been paid; a better militia law; an improved law on the subject of voluntary assignments; a law more explicitly regulating the assessment and taxation of railroads; a law forbidding the pledging or negotiating of the school and seminary bonds of the state in the keeping of the State treasurer; a law authorizing a majority of the voters of a county to prohibit swine running at large; a law on the subject of arbitrations; a law for the punishment and suppression of certain confidence games; a jury bill for the city of St. Louis.

The Supreme Court of Missouri have declared the decision of the St. Louis Court of Appeals in the case of Frank J. Bowman, 8 Cent. J. L. 250, to be final. The two applications of the defendant were shortly disposed of on the 2d inst., the court delivering the following opinions:

The opinions filed are in full as follows: In the matter of Frank J. Bowman, application for Writ of Error from St. Louis Court of Appeals.

PER CURIAM. We deny the writ of error in this case because we regard it as one in which no such writ lies from this court to the St. Louis Court of Appeals, the latter court, in our opinion, being the court of last resort in cases of this character.

In Re Bowman. Application for Alternative Writ of *Mandamus* to St. Louis Court of Appeals.

PER CURIAM. The alternative writ is denied because we regard this case as one in which no appeal lies from the St. Louis Court of Appeals to this court, the St. Louis Court of Appeals being the court of last resort.